Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

EDWIN WILLIAM BONNELL

Petitioner,

v.

AMTEX, INC.

Respondent.

Petition For Writ Of Certiorari
To the U.S. Court of Appeals
For the 11th Circuit

PETITION FOR WRIT OF CERTIORARI

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3 HRP

QUESTIONS PRESENTED

1. Whether the actions of the District Court who after sanctioning the Appellant for his appeal from the original action before the Bankruptcy Court, then affirmed a judgement for additional sanctions filed in the Bankruptcy Court based upon the District Court Sanctions for the same conduct in the same action, 4 months after the original sanctions were rendered and 14 months after the case originally left the Bankruptcy Court?

2. Whether the actions of the Courts in this case violate the intent and the letter of the Federal Rule of Civil Procedure 11 ?

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IN THE UNITED STATES SUPREME COURT

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AMTEX, INC.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the 11th Circuit entered in the above styled case on August 12, 1996. In that decision, the Court let stand the decision of the District Court to affirm the placing of additional sanctions upon the Petitioner by the Bankruptcy Court in an action based upon the sanctions rendered by the District Court for the same conduct 4 months earlier and 14 months after the case had left the Bankruptcy Court. Said decision is clearly erroneous in light

of the Federal case law concerning the intent and implementation of Federal Rule of Civil Procedure 11 supported by the Fifth and Fourteenth Amendments to the Constitution of the United States.

OPINIONS BELOW

The Order of the Bankruptcy Court rendering additional sanctions is appears as Appendix A ("App A")

JURISDICTION

The Judgement of the Court of Appeals affirming the District Court was entered on August 13, 1996. The jurisdiction of this Court is invoked under 28U.S.C. 1257.

CONSTITUTIONAL PROVISIONS

Fifth Amendment of the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offense, to be twice put in

jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the Constitution of the United States

Sect. 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within.

Sect.2 Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at an election for the choice of electors for President and Vice

President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and the citizen of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sect. 3 No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall having engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds

of each house, remove such disability.

Sect. 4 The validity of the public Debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be illegal and void.

Sect. 5 The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

The Petitioner appealed to the District Court from an order granting the Respondents a summary judgement without the benefit of a hearing. The District Court affirmed the ruling of the Bankruptcy Court in a de novo review again without a hearing. Thus, the Petitioner could not present witnesses and additional discovery which had been collected in depositions in New York state under a

contempt citation rendered against the Respondents by the Bankruptcy Court for the Southern District of New York for impeding Petition's discovery efforts. The Court of Appeals denied oral argument and affirmed the District Court adding additional sanctions by doubling the costs of the Appeal.

ARGUMENTS AND AUTHORITIES

COMES NOW, the Petitioner in the above styled action to present to this Honorable Court both argument and authorities in support of Petitioner's contention that the actions of the District Court were not simply an abuse of discretion but rather were clearly in contravention of the law.

The Bankruptcy Act of 1978 established in each federal district as an adjunct to the Federal District Court for the District, a United States Bankruptcy Court. The Bankruptcy Court as adjunct of the District Court was limited in its jurisdiction to those civil proceedings arising under Title 11 or arising in or related to cases under Title 11 (28USCS sec. 147 (b)). Furthermore in the 11th Circuit

today, the route of appeal from any decision of the Bankruptcy Court is through the District Court. There presently is no direct appeal to the 11th Circuit Court of Appeals. Consequently, rulings by the District Court on matters brought to that Court from the Bankruptcy Court in the appeal process are binding on the Bankruptcy Court. In the case which is the subject of this appeal, the District Court had rendered monetary sanctions upon the Petitioner in this case pursuant to Rule 11. The Respondent, four months after this sanction was rendered, filed a motion based upon Rule 9011 in Bankruptcy Court, for additional sanctions to be rendered allegedly for the attorneys fees requires to defend the Petitioner's alleged frivolous action in the Bankruptcy Court. The Bankruptcy Court then, citing as one of its basis for its decision, the original sanctions imposed by the District Court, imposed additional sanctions upon the Appellants counsel for an amount in excess of Seven Thousand Dollars. This decision by the Bankruptcy Court was made a full 18 months after the case had originally left the Bankruptcy Court. The Petitioner

contends that this exercise by the Bankruptcy Court was in violation of the requirements of Rule 11 and represents an exercise of judicial power not within purview of the Bankruptcy Court in this particular fact situation. That is not to say that under Rule 9011, the Bankruptcy Court doesn't have the power to impose similar Rule 11 sanctions, it does. But rather after the District Court had imposed sanctions, the purpose for the rule had been met and the actions of the Bankruptcy Court became punitive in violation of the intent of Rule 11. Rule 11 as written and interpreted by the Courts was designed simply to deter pleadings that are "frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith'". Zaldivar v. City of Los Angeles 780 F.2d 823 (9th Cir. 1986).

Further, the Court opined that the Rule is violated only when it is patently clear that a claim has no chance of success. Ibid. However, when a District Court decides to award a monetary sanction as in this case, the total amount of the sanction as well as the initial decision to impose such

sanctions should be guided by equitable considerations. Doering v. Union County Bd. of Chosen Freeholders 857 F.2d 191,195(3rd Cir. 1988). Some of these factors as evidenced by case law in this area the Court should consider 1. the reasonableness of the opposing party's attorney's fees; 2. the minimum to deter; 3. the ability to pay; and finally factors relating to the severity of this violation of Rule 11. In Re: Kunstler 914 F.2d 505 (4th Cir. 1990)

Applying these factors to the present case one must conclude that the District Court had already judged the appropriate sanction to be applied in this case and so imposed it. Consequently, the subsequent imposition of additional sanctions by the Bankruptcy Court was punitive in nature and beyond both the intent and scope of Rule 11 or Rule 9011 when exercised by the Bankruptcy Court.

Another factor to be explored was the timeliness of the Bankruptcy Court's action. Although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate there would be such a lengthy delay as exists in this case. Cooter & Gell v.

Hartmax Corp. 496 U.S. 384 (1990). Rule 11 provides for a "safe harbor" time frame which allows the alleged violator a chance to withdraw the offending pleading or allegation within a 21 day period after the party was provided notice but before the motion for said sanctions had been filed. Obviously, in this fact situation this option was not available has already imposed sanctions which were meant as a deterrent. Thus, the alleged offending conduct had been sanctioned. This should have ended the case.

Furthermore, Rule 11 provides that a party cannot delay serving its Rule 11 motion until after either the conclusion of the case or a judicial rejection of the offending contention. Such was the case here, the Respondents did not file with the Bankruptcy Court until four months after the District Court had rendered its sanctions. This also was a clear violation of Rule 11. Likewise, the Federal Rules provide in FRCP 54(d)(2)(B) that a motion for sanctions must be filed within 14 days of the entry of judgement. Again, the 4 months hiatus before filing its motion for the sanctions in the Bankruptcy Court, an adjunct of the

District Court, violated both the letter and spirit of Rule 11 since neither the language of Rule 11 nor the Advisory Committee's Note suggests that the Rule could not require payments for any activities outside the contest of a District Court Proceeding. Cooter & Gell. p.407.

In this case, the District Court had initiated a de novo review of the case before it imposed its sanctions. Consequently, an inferior Court would have no jurisdiction to review the same issues as the District Court, This fact brings us to the question of whether the doctrine of collateral estoppel might apply in this case. The 11th Circuit in Hoskin v. Yank 931 F2d. 42 (11th Cir. 1991) provided a precedent for the implementation of the doctrine in this Circuit. The Court in its review of the elements listed them as follows: The first element was that the issue at stake be identical in the prior litigation. Such was the case here as the Respondent's motion was based upon Rule 9011 and the action taken by the District Court when it imposed sanctions. Secondly, that the issue actually had been litigated in the prior litigation. The Respondent's motion to

the Bankruptcy Court was based upon the fact that the District Court had already imposed sanctions. So quite obviously this issue was litigated in the prior litigation. Thirdly, the Court opined that the determination of this issue in the prior litigation had been a central and necessary part of the judgement in the prior action. The facts show that it was. Finally, the 11th Circuit required that the relative burdens of proof be at least equal in each action. Since both actions were based upon Rule 11, the burdens of proof were in fact the same and the Courts are the same since the Bankruptcy Court is an adjunct of the District Court. Therefore, the conclusion must be that collateral estoppel applies in this fact situation. Whereupon, the action of the District Court affirming the ruling of the Bankruptcy Court must be held to be an egregious interpretation of the law and must be reversed. Finally, there must be some consideration given to both the due process aspects of a Rule 11 violation and the legislative purpose for the Rule. According to the 11th Circuit standard, Donaldson v. Clark 819 F.2d 1551,1558 (11th Cir.

1987), determining what process was due simply requires the application of the principles of due process. In this setting Donaldson p.1559 cited Mullane v. Central Hanover Trust Co. 339 U.S. 306 (1950) on what process is due:

> **"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances, to apprise interested parties of the pendency of an action and afford them an opportunity to present their objections."**

In the case before this tribunal, the District Court had originally imposed sanctions. The issue had thus been decided WITH FINALITY. The hearing which took place before the Bankruptcy Court was NOT A FAIR AND IMPARTIAL HEARING. The Court would not allow the Petitioner to argue his case limiting Petitioner to respond to issues which could not establish that the answer and counterclaim filed by the Appellant in this case did in fact meet the muster of Rule 11. The Bankruptcy Court's ruling implied that since the District Court had already imposed sanctions, the question of the Petitioner's liability was not an issue. In support of their ruling the Bankruptcy Court

listed seven (7) reasons for the imposition of additional sanctions none of which were even mentioned by the Court at the hearing or in the notice. Therefore, the Petitioner could not respond to them since Petitioner had no knowledge of their content. Of the 7 reasons listed by the Court, five had no bearing on nor were they covered by Rule 11. Of the five, we examined each of them starting number three. Number three factor for the imposition of sanctions was that the appellant filed a counterclaim against AMTEX,INC. when no facts existed. The fact is that the counterclaim was filed against COLIN OFFENHARTZ and NOT AMTEX,INC..FRCP 13 (a) defines a compulsory counterclaim as one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim...." Such was the case here, since the fact in the counterclaim were never disputed. Service was achieved under FRCP 5 by serving local counsel with a copy of the counterclaim. Opposing Counsel then filed an answer to the counterclaim, NEVER DENYING HIS REPRESENTATION OF COLIN OFFENHARTZ. In addition to the allegations

made in the counterclaim pursuant to FRCP 8, the Appellant had witnesses to the transaction including but not limited to the Petitioner's New York Counsel, co-defendants in New York, Michael Zeger and Nancy Turner, Their Counsel, representatives from Marine Midland Bank and Barclay's Bank to list only a few of the witnesses that would support the Appellant's counterclaim. These witnesses were generated by discovery which was curtailed by the Court prior to the New York discovery being completed. This was due in no small part by the FLAGRANT FAILURE of the appellees to provide the discovery requested. This fact will be examined below. The second of the five factors was listed as three in the Court's order. That was that the Petitioner failed to serve and otherwise prosecute after seeking the Court's permission to do so. This allegation also in not a violation of Rule 11. The facts to this allegation were that the Petitioner filed a motion to add parties under FRCP 19 & 20. THE RESPONDENT NEVER OBJECTED, HENCE THE MOTION WAS GRANTED. Service was attempted under FRCP 5 without success. Petitioner, then after

reviewing the answer Petitioner had received from Opposing Counsel, concluded that he had service already under FRCP 13 and 5. The third of these factors was the allegation that the Petitioner had filed false dates on his certificates of service. This allegation represents one of the biggest stretches of logic by the Bankruptcy Court in its effort to justify its sanctions. First, the Petitioner categorically denies any such misdating. Further, this issue was never argued by the parties and is not supported by any evidence and of most importance. This CONDUCT IN NOT A VIOLATION of Rule 11. The next factor cited by the Court was that the affidavit of the Petitioner filed in the original action contained inaccurate and misleading statements. There are two replies for this allegation. In the first place, under FRCP 52, issues involving credibility are NORMALLY CONSIDERED QUESTIONS OF FACT for which testimony should be taken from witnesses. Without such evidence the Petitioner cannot be said to have received due process from the Bankruptcy Court. In this particular case, this decision was made arbitrarily and long after this case

had left that Court since it was not in the original appeal. It is important to note that there were NEVER ANY WITNESSES TESTIMONY IN THIS CASE. Secondly, as to this allegation, the original decision in this case rendered by the District Court is Res Judicata as to such allegations as made by the Bankruptcy Court in supporting its imposition of sanctions. For as the Supreme Court held in Grubb v. P.U.C. 281 U.S. 470 (1930); that a judgement on the merits in one action is Res Judicata where both the parties and the subject matter are the same, this applies not only to matters actually presented to sustain or defeat a right asserted but also as it respects any other available matter that might have been presented to that end. The last of the five factors used by the Bankruptcy Court to support its imposition of sanctions namely the Petitioner's counsel misrepresented to the Court, the status of the Petitioner's appeal to the 11th Circuit. This allegation again underlines the prejudice engendered by the Bankruptcy Court toward the Appellant. First, statements of the kind alleged to have been made by the Petitioner's counsel in open Court ARE NOT

COVERED BY RULE 11. (see notes of Rule 11) USCS. pp.134-136. Secondly, there was no attempt by the Appellant to misrepresent anything to the Bankruptcy Court or any other. Further, if there was under FRCP 52, such issues credibility create issues of fact. Such issues should be dealt with in an evidentiary hearing. However, there never was an evidentiary hearing in this case. This fact simply reinforces the Appellant's contention that the Bankruptcy Court throughout this case has not been an impartial obiter of the facts. Rather the Court has been adversarial since the time of Petitioner's first appeal from the Bankruptcy Court's order. Petitioner believes that most of this enmity stems from an ex parte letter sent to the Court by the Respondents New York counsel making baseless allegations against Petitioner's counsel in a style one could best characterize as a poison pen letter. There never was any attempt to substantiate any of the allegations. Consequently, the Petitioner believed that no one would give any credence to this improper and grievous breach of judicial procedure. The Petitioner apparently was mistaken.

In any case, the final two factors, listed by the Bankruptcy Court as factors which lead to the imposition of sanctions was that Petitioner failed to assert any legitimate defenses specially in light of the New York judgement in which the Bankruptcy Court alleges he admitted his acts in the New York Court. Here again Res Judicata applies as to the substantive issues in the District Court's judgement of this case and the time frames listed were certainly not complied with in regard to Rule 11. Finally, any collateral issues as to whether the Petitioner's attorney had abused judicial process were dealt with the District Court an Appellant contends that the doctrine of collateral estoppel would apply to this allegation.

The major goals of Rule 11 are basically to rid the Courts of meritless litigation and to reduce the growing costs and burdens of civil litigation. Donaldson p. 1559 The Court in Donaldson continued to opined that it would be counter productive if Rule 11 itself were to cause an increase in unnecessary litigation by mandating collateral procedures to act as prerequisites to the imposition of

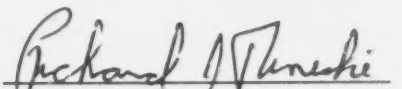
sanctions. Ibid. p.1559. Yet in this case we are faced with sanctions being imposed by the District Court and the Bankruptcy Court four months after the District Court awards imposing additional sanctions based upon the fact that the District Court had originally sanctioned the party. Clearly, this action by the Bankruptcy Court and the subsequent rubber stamp by the District Court contravenes the intent, purpose and letter of Rule 11. For Rule 11 is not a fee-shifting statute, policies which allow the District Courts to require the losing party to pay appellate, as well as District Court attorney's fees are not applicable. A Movant under Rule 11 has no entitlement to fees or an other sanction, and the contrary view can only breed appellate litigation. Litigation, Rule 11 was designed to stop. Cooter & Gell v. Hartmax Corp. 110 S.Ct. 2447 (1990).

CONCLUSION

Wherefore, the Petitioner contends that the initial sanctions imposed by the District Court, whether they were justified or not, ended the use of Rule 11. Since Rule 11 sanctions were met to deter Rule 11 violations.

Consequently, the Bankruptcy Court should be collaterally estopped from imposing additional sanctions. Especially in light of the fact that this collateral litigation is the direct result of the abuse of Rule 11 by the District Court. In addition, the factors cited by the Bankruptcy Court must be considered to be untenable as a matter of law. Similarly, the actions of the District Court by affirming the appeal cannot be viewed under the abuse of discretion standard. Rather, it must be viewed for what it is, namely a contravention of the law since the District Court thoroughly misapplied the law in the case thereby denying the Petitioner due process.

This 8th day of November 1996



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APPENDIX A

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 13 1996
MIGUEL J. CORTEZ
CLERK

No. 95-9608
Non-Argument Calendar

D. C. Docket No. 1:95-CV-0481

IN RE:

EDWIN WILLIAM BONNELL,

Debtor.

EDWIN WILLIAM BONNELL,

Plaintiff-Appellant,

versus

AMEX, INC.

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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Before DUBINA, CARNES AND BARKETT, Circuit Judges.

JUDGEMENT

This cause came to be heard on the transcript of the record from the Unites States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgement of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendant-appellee double costs on appeal to be taxed by the Clerk of this Court.

Entered: August 13, 1996
For the Court: Miguel J. Cortez, Clerk

By: Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 9/12/96

MC 1-4-95
Pltf Weaver
Deft Tuneski

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
	:	
EDWIN WILLIAM BONNELL,	:	**BANKRUPTCY CASE**
	:	**NO. A91-70587-WHD**
Debtor.	:	
_____	:	
	:	
AMTEX, INC.,	:	
	:	
Plaintiff,	:	**ADVERSARY CASE**
	:	**NO. 91-6681A**
v.	:	
	:	
EDWIN WILLIAM BONNELL,	:	
	:	**IN PROCEEDINGS UNDER**
	:	**CHAPTER 7 OF THE**
Defendant.	:	**BANKRUPTCY CODE**

ORDER

This matter comes before the Court on the Motion for Attorney Fees and Expenses filed in this proceeding on September 13, 1994, by the plaintiff Amtex, Inc. (hereinafter "Amtex"). By its Motion, Amtex requests that the Court sanction Richard J. Tuneski (hereinafter "Tuneski"), attorney for the debtor / defendant Edwin William Bonnell (hereinafter "Bonnell"), pursuant to Fed. R. Bankr. P. 9011.

The issues involved herein arise in a core proceeding over which this Court has jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I). The Court conducted a hearing on a Motion on November 8, 1994, after which time it took this matter under advisement. After carefully considering the briefs filed by the parties and the arguments made at the hearing, the Court will grant the Motion for the reasons stated in the discussion below.

DISCUSSION

Amtex commenced this proceeding against Bonnell in 1991 as a Complaint to Determine Non-Dischargeability of Debt. The basis of Amtex's claim was a judgement entered by a state court in New York which found that Bonnell, an employee and shareholder of Amtex, had embezzled funds.[1] Bonnell, through Tuneski as his attorney, filed an answer denying the allegations, and further filed a counterclaim seeking $50,000.00. In addition, Tuneski sought the permission of this Court to add additional parties as third party defendants.

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[1] **The facts underlying this claim are set out in greater detail in this Court's Order dated February 17, 1993.**

The Court granted this request by Order dated July 28, 1992, but Tuneski failed to serve or otherwise add any additional parties.

On February 17, 1993 the Court entered summary judgement against Bonnell after finding that the New York state judgement and the doctrine of collateral estoppel established that the debt in question was excepted from discharge pursuant to 11 U.S.C.§523 (a)(4). The Court also found in favor of Amtex on Bonnell's counterclaim, finding that no facts existed, or were even alleged, to support the claim. Tuneski filed a motion for a new trial on behalf on Bonnell, which the Court denied. Subsequently, Tuneski filed an appeal, but the District Court issued an order affirming this Court's ruling.[2] Moreover, by Order dated July 20, 1994, the District Court denied Tuneski's motion for reconsideration and sanctioned Tuneski for advancing frivolous arguments during the case. Tuneski since has filed an appeal on behalf on Bonnell to the Eleventh Circuit Court of Appeals.

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[2] Amtex, Inc v. Edwin William Bonnell, Case no. 1:93-CV-1248-MHS (N.D. Ga., Apr. 21, 1994).

In bringing this Motion before the Court, Amtex argues that the facts of this case show a history of attorney conduct that is clearly in violation of Rule 9011, which provides in pertinent part as follows:

> **The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; *and that it is not interposed for any improper purpose, such as to harass, or to cause unnecessary delay, or needless increase of the cost of litigation or administration of the case.* . . . If a document is signed in violation of this rule, the court on motion or on its own initiative, *shall* impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses occurred because of the filing of the document, including a reasonable attorney's fee.**

Fed. R. Bankr. P. 9011 (emphasis added). Amtex claims that Tuneski filed pleadings and advanced claims that had no chance for success under existing law and that he did so simply to hinder and delay the execution of the New York embezzlement judgement against his client. In opposing this

motion, Tuneski denies the frivolity of his defense and claims he simply was providing his client with the best representation possible.

As a general matter, this Court is not one that is predisposed to issue sanctions upon the occurrence of slight transgressions in judgement that may occur during the course of a case. Nevertheless, situations may arise where the Court, do to mandatory language of Rule 9011, must impose such sanctions. In the proceeding *sub judice*, the Court takes note of the existence of several troubling facts which call for a serious consideration of sanctions. These facts include, but are not limited to, the following: (1) failing to assert any legitimate defenses or colorable arguments while vigorously opposing Amtex's complaint, particularly in view of Bonnell's admission in the New York state court that he had committed the acts in question; [3]

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[3] **For example, in opposing the earlier Motion for Summary Judgement, Tuneski claimed that, for purposes of collateral estoppel, no final judgment on the merits had been entered in the New York court. The facts and law, however, clearly showed otherwise.**

(2) filing a counterclaim against Amtex when no facts existed, or were even alleged, to support such a claim; (3) failing to serve and otherwise prosecute third party defendants after seeking and obtaining the permission of this Court to do so; (4) filing certificates of service containing false service dates; [4] (5) preparing and filing Bonnell's affidavit which contained inaccurate and misleading statements; (6) misrepresenting to the Court the status of Bonnell's appeal to the Eleventh Circuit; [5]

---

[4] One example of such conduct may be found in Bonnell's Motion for a New Trial. According to the certificate of service, Tuneski claimed he served the Motion upon Amtex March 1, 1993. In reality, the Motion was served on March 4, and Amtex did not receive it until March 8, thereby placing Amtex under considerable time constraints if it was to reply to the Motion within the time limits established by the Local Rules. Amtex alleges that this example is just one of many occasions in which Tuneski included false service dates on his certificates of service.

[5] In responding to the Motion currently before the Court, Tuneski claimed that this case was currently docketed in the Eleventh Circuit and under the jurisdiction of that court. As Amtex points out, however, Tuneski has only filed a notice of appeal from Judge Shoob's orders, but has not taken the necessary steps to complete the appeal, contrary to the time limits and requirements of the Federal Rules of Appellate Procedure. As such, it appears that no appeal to the Eleventh Circuit actually exists. Furthermore, whether such an appeal exists has little bearing upon the matters presently under consideration.

and (7) the finding by Judge Shoob in the District Court that Tuneski has acted improperly in this case in violation of Fed. R. Civ. P. 11.

Had the Court come across any one of these facts by itself, it likely would have dismissed it as an act of carelessness or oversight on the part of Tuneski. Considered in the aggregate, however, these facts require the Court to find that Tuneski has engaged in conduct in this proceeding for the improper purpose of harassment, causing unnecessary delay, and increasing the costs of litigation. The mandatory language of Rule 9011 requires this Court to issue sanctions, and Amtex requires sanctions in the amount of $16,442.00 to cover its attorneys' fees and costs. The Court, however, believes that the amount requested is too high in view of the facts and circumstances of this preceding. Instead, the Court concludes that $7,500.00 as partial reimbursement for Amtex's fees and costs is an appropriate sanction under Rule 9011.

The Court wishes it to be known that it takes no pleasure in issuing these sanctions. In a sense, the Court believes Tuneski when he claims he conducted himself in a

manner he saw necessary to represent his client's best interests. Nevertheless, a counsel's desire to represent his client's interest does not give him an unfettered right to file frivolous motions, make misleading arguments, and otherwise hamper and delay the administration of justice. Rule 9011 draws the line between appropriate conduct which represents a client's best interest and inappropriate conduct that is sanctionable. Regrettably, Tuneski has crossed that line.

CONCLUSION

Accordingly, in view of the many examples of improper conduct committed by Tuneski during the course of this proceeding, Amtex's Motion for Attorney's Fees and Expenses pursuant to Fed. R. Bankr. P. 9011 is hereby GRANTED. Tuneski is ordered to partially reimburse Amtex's attorney's fees and costs in the amount of $7,500.00.

IT IS SO ORDERED.

At Atlanta, Georgia, this 3 day of January, 1995.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE